104

No. (1)

Supreme Court, U.S.
FILED

FILE COPY 08124 JUL 28 2008

OFFICE OF THE CLERK

In The Supreme Court of the United States

HOMI N. AMIRMOKRI,

Petitioner,

v.

DEPARTMENT OF ENERGY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

Morris E. Fischer
Counsel of Record
LAW OFFICE OF MORRIS FISCHER
Air Rights Center
4550 Montgomery Avenue, Suite 601N
Bethesda, Maryland 20814
(301) 469-3498

Counsel for Petitioner

THE LEX GROUP DC • 1750 K Street N.W. • Suite 475 • Washington, DC 20006
(202) 955-0001 • (800) 815-3791 • Fax (202) 955-0022 • www.thelexgroupdc.com

QUESTION PRESENTED

Whether the administrative judge's decision that Petitioner's protected disclosures were not the reason for the adverse action against him by a clear and convincing standard was arbitrary, capricious, an abuse of discretion, obtained without procedures required by law, rule, or regulation having been followed, or unsupported by substantial evidence?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Homi N. Amirmokri certifies that he is not a corporation.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF CONTENTS TO APPENDIX iv

TABLE OF AUTHORITIES vi

DECISIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 4

I. The Administrative Judge Erroneously Concluded Under the Clear and Convincing Evidence Standard that the Agency Would have Taken the Same Action Against Petitioner 4

CONCLUSION 7

APPENDIX

TABLE OF CONTENTS TO APPENDIX

Appendix Page

Judgment of
The United States Court of Appeals
for the Federal Circuit
entered February 19, 2008 1

Initial Decision of
The Merit Systems Protection Board
entered May 25, 2006 3

Order of
The United States Court of Appeals
for the Federal Circuit
Re: Denying Petition for Rehearing
entered April 30, 2008 31

Excerpts of Transcript of Proceedings before
The Merit Systems Protection Board
on April 5, 2006 33

Testimony of Homi Amirmokri:

Direct Examination by Mr. Fischer 33
Cross Examination by Ms. Richards 42

Testimony of Dennis Miotla:

Cross Examination by Mr. Fischer 45

Exhibit:

14. Affidavit of Homi Amirmokri
sworn December 23, 2005.....49

Email to
Owen Lowe from
Dennis Miotla
Re: Owen, Homi: Update Activities
dated February 1, 2005.....51

TABLE OF AUTHORITIES

Page(s)

CASE

Horton v. Department of the Navy,
66 F.3d 279 (Fed. Cir. 1995), cert. denied,
516 U.S. 1176 (1996) 5, 7

STATUTES

5 U.S.C. § 2302(b)(8) 3

5 U.S.C. § 2302(b)(8)(A) 1

5 U.S.C. § 7703(c) 2, 4

28 U.S.C. § 1254(1) 1

REGULATION

5 C.F.R. § 1209.4(d) 5

DECISIONS BELOW

The initial decision of the Merit Systems Protection Board denying Petitioner's request for corrective action is dated May 25, 2006, Docket No. DC-1221-06-0130-W-1. The final decision of the Merit Systems Protection Board is dated November 17, 2006, Docket No. DC-1221-06-0130-W-1. The decision of the court of appeals for the federal circuit affirming the final decision of the Merit Systems Protection Board is dated February 19, 2008, No. 2007-3101.

JURISDICTION

The judgment of the court of appeals was entered on February 19, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The text of 5 U.S.C. § 2302(b)(8)(A) prohibits any employee with supervisory authority to:

> (8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of--
>
> (A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences--

(i) a violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,

if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs...

5 U.S.C. § 7703(c) states:

(c) In any case filed in the Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be--

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence;

STATEMENT OF THE CASE

This is an appeal from a federal circuit decision which affirmed the final decision of the Merit Systems Protection Board ("M.S.P.B.," "Board"), denying Petitioner's request for relief from adverse action on the grounds such action was in retaliation for his protected disclosures.

Soon after new regulations were promulgated in April, 2003, Petitioner alerted his supervisor to the regulatory noncompliance of a safety document pertaining to a nuclear "cue ball" cask containing nuclear material. App. at 33. In June of 2003, prior to making his protected disclosure, Petitioner was reassigned, but until September, 2004, was given only one substantial task, while between October, 2004 and April, 2005 Petitioner spent seventy percent of his time only on increasing his expertise. App. at 50. After Petitioner's attorney forwarded letters regarding Petitioner's concerns to the Secretary of Energy in October, 2003, Petitioner's job duties were cut in January, 2004, leaving him without any management responsibility. App. at 34-39. This reduction in duties was illegal retaliation against the Petitioner for his protected activity under 5 U.S.C. § 2302(b)(8).

Administrative Judge Cook ("AJ"), writing for the Board, found the appellant made a non-frivolous allegation of his protected activity being a "contributing factor" to the adverse action, and therefore find that the appellant had established jurisdiction over his case. App. at 3-4, 8-9, 19-21. In ruling for the agency, however, the AJ found that the

record contained clear and convincing evidence that the agency would have taken the same actions against the appellant in the absence of any protected disclosures. App. at 22-23.

Under the standard of review set out in 5 U.S.C. § 7703(c), the court of appeals for the federal circuit affirmed the AJ's decision.

REASONS FOR GRANTING THE PETITION

I. The Administrative Judge Erroneously Concluded Under the Clear and Convincing Evidence Standard that the Agency Would have Taken the Same Action Against Petitioner

Petitioner engaged in a protected disclosure in June 2003 when he alerted his supervisor, Mr. Lowe, to the regulatory noncompliance of a safety document for a nuclear "cue ball" cask which contained nuclear material. App. at 33. Petitioner then followed up with a protected disclosure to the Secretary of Energy in October, 2003, and his new position description was given in January, 2004. App. at 34-39.[1] After the new position description was issued, Petition was never again called on to comment regarding the regulation he made his protected disclosures on. App. at 40-41.

It is well-established that once the appellant has met his initial burden, the agency must

---

[1] Mr. Miotla, Petitioner's second-line supervisor, paradoxically claimed that Petitioner can read very well but that he is deficient at the application of regulations of law. App. at 45-47.

establish by clear and convincing evidence that it would have taken the same personnel actions in the absence of the disclosure. Horton v. Department of the Navy, 66 F.3d 279 (Fed. Cir. 1995), cert. denied, 516 U.S. 1176 (1996) (noting that the "employee's showing that the disclosure was a contributing factor must be made by a preponderance of the evidence, and the agency's affirmative defense must be established by clear and convincing evidence."). Clear and convincing evidence is that measure or degree of proof that produces in the mind of the trier of fact a reasonable belief as to the allegations sought to be considered. See, e.g., 5 C.F.R. § 1209.4(d).

The M.S.P.B. misinterpreted and misapplied the standard of clear and convincing evidence by wholly overstating the strength of the evidence which favored the agency and ignoring evidence in Petitioner's favor. App. at 24-25 (arguing "the agency has provided strong evidence to support its reassignment, change of duties, work assignments, etc."). Petitioner received revised job duties *after* writing the Secretary of Energy regarding his safety concerns for the nuclear facility at Oak Ridge. See App. at 34-39; see also App. at 46-47 (asserting that as Petitioner's supervisor, Mr. Miotla would not put Petitioner on a job requiring application of law, but also stating "he can read very well."). The agency argued that the January 2004 new position description, which took away all of Petitioner's management responsibility, simply memorialized what had taken place in June of 2003; however, this document was not presented by the agency. App. 42-44. Moreover, there was clear hostility to Petition in

the workplace regarding Petitioner's protected disclosures. In an e-mail exchange in February, 2004, between two of his supervisors, one questioned whether it was "a good idea to turn [Petitioner] loose on DSA's for older facilities that have required some thoughtful interpretation of [the code of federal regulations]." App. at 51[2]; compare App. at 47-48 (Mr. Miotla stating he would not want Petitioner leading a team of experts) with Corrected Brief of Petitioner at 15 (noting Petitioner's job for over a year was leading a team of experts, and was given to him after his removal from Oak Ridge). This crude comment referenced the very regulations Petitioner reported the safety document being in noncompliance with. App. at 47-48.

Second, contrary to the Board's assertion that there was no "strong motive to retaliate against the [Petitioner]," such a motive existed within the letters Petitioner sent to the Secretary of Energy. See App. at 10-11, 18-19. Petitioner squarely named one of his supervisors, Mr. Lowe, in his letter to the Secretary, accusing him of deleting significant safety recommendations from Petitioner's report. See Corrected Brief of Petitioner at 6. The Board's analysis is therefore found lack of motive for retaliation where there clearly was one. Id.

Finally, the Agency failed to present any evidence it treated other similarly situated persons as it treated Petitioner. See App. at 24-26. With the lack of Board consideration on this point, it hardly stands to reason that the Agency met its burden to a

---

[2] The Board's does not address or mention any of this evidence.

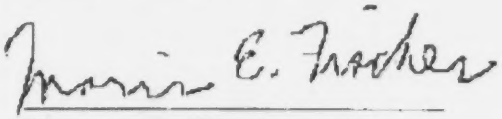
clear and convincing evidence standard. See Horton, 66 F.3d at 284.

Because the evidence favors Petitioner, not the Agency, the Board misinterpreted and misapplied the clear and convincing evidence standard. See Horton, 66 F.3d at 284. With the weight of the evidence in Petitioner's favor, the Board could not have correctly concluded that the Agency proved its burden to a clear and convincing evidence standard. See Horton, 66 F.3d at 284.

CONCLUSION

For the reasons stated above, the Board's opinion should be reversed in its entirety.

Respectfully Submitted,



Morris E. Fischer, Esq.
Air Rights Center
4550 Montgomery Avenue
Suite 601 N
Bethesda, MD 20814
(301) 469-3498 phone
(301) 469-3499 fax

Attorney for Petitioner

NOTE: This disposition is nonprecedential.

United States Court of Appeals
for the Federal Circuit

[Entered: February 19, 2008]

2007-3101

HOMI N. AMIRMOKRI,

Petitioner,

v.

DEPARTMENT OF ENERGY,

Respondent.

Morris E. Fischer, Law Office of Morris E. Fischer, of Bethesda, Maryland, argued for petitioner.

Tara J. Kilfoyle, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, argued for respondent. With her on the brief were Jeanne E. Davidson, Director, and Deborah A. Bynum, Assistant Director.

Appealed from: Merit Systems Protection Board

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

2007-3101

HOMI N. AMIRMOKRI,

Petitioner,

v.

DEPARTMENT OF ENERGY,

Respondent.

Judgment

ON APPEAL from the Merit Systems Protection Board
in CASE NO(S). DC1221060130-W-1

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

Per Curiam (NEWMAN, SCHALL, and MOORE, Circuit Judges).

AFFIRMED. See Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

DATED: February 19, 2008 /s/ *Jan Horbaly*
Jan Horbaly, Clerk

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

[Entered: May 25, 2006]

HOMI N. AMIRMOKRI,
Appellant,

v.

DOCKET NUMBER
DC-1221-06-0130-W-1

DEPARTMENT OF ENERGY,
Agency.

DATE: May 25, 2006

Morris E. Fischer, Esquire, Bethesda, Maryland,
for the appellant.

Isiah Smith, Jr., Esquire, Jocelyn Richards, Esquire,
& Katie Strangis, Esquire, Washington, D.C.,
for the agency.

BEFORE
Thomas P. Cook
Administrative Judge

INITIAL DECISION

On November 16, 2005, the appellant filed a timely individual right of action (IRA) appeal alleging that the agency took various personnel actions in reprisal for his protected whistleblowing

activity.[1] The Board has jurisdiction over the appellant's IRA. 5 U.S.C. § 1221; 5 C.F.R. § 1209.2. For the reasons explained below, however, the appellant's request for corrective action is DENIED.

ANALYSIS AND FINDINGS

Background

Many of the facts in the appeal are undisputed. The appellant is a Nuclear Engineer, GS-0840-15, with the agency's Office of Nuclear Energy, Science and Technology in Germantown, Maryland, a location outside of Washington, D.C. The appellant worked as the Headquarters Program Manager for nuclear facilities at Oak Ridge National Laboratory (ORNL) in Oak Ridge, Tennessee, from May 1998 until the agency detailed him to new duties on June 16, 2003. The agency initiated the appellant's detail after he made a May 2003 site visit to ORNL. The appellant then sent an e-mail to the agency's Inspector General on June 17, 2003, and the agency issued a letter of reprimand to him for his May inappropriate behavior on June 27, 2003. Over the course of approximately 1 year beginning in the fall of 2003, the appellant sent several complaint letters and e-mails to the Secretary of Energy, Congressman Markey and his second line supervisor, Dennis Miolta. The agency formally reassigned the appellant to a new position description with a new performance plan in January

---

[1] The appellant timely refiled his IRA on November 28, 2005, after the Board rejected his initial November 16 filing because he did not provide the required number of copies.

2004, although he currently remains a GS-15 Nuclear Engineer.

The appellant filed a discrimination complaint against the agency,[2] and an administrative judge from the Equal Employment Opportunity Commission held a hearing on January 25, 2005. The EEOC administrative judge issued a bench decision on February 4, 2005, finding no discrimination and entering judgment for the agency.[3] In May 2005, the appellant filed a whistleblower complaint with the Office of Special Counsel alleging that the agency had taken numerous personnel actions in reprisal for a number of alleged whistleblowing disclosures. On September 16, 2005, OSC advised the appellant it had terminated its inquiry into his allegations and that he had a right to seek corrective action from the Board. The appellant then filed a timely IRA with the Board. AF, Tabs 1, 2.

In December 2005, I issued a show cause order to the appellant explaining the jurisdictional requirements and burden of proof in an IRA appeal, and I ordered him to file evidence and argument establishing the Board's jurisdiction over his IRA. AF, Tab 4. The appellant filed extensive argument

---

[2] The record reflects that the appellant previously filed a discrimination complaint against the agency in October 2000 after he failed to receive a promotion to GS-15. Apparently, judgment was entered against the appellant in federal district court and he appealed to the Fourth Circuit Court of Appeals. This case is not relevant to the appellant's IRA.

[3] The parties have informed me that this discrimination claim is currently in litigation in a federal district court.

and evidence in response to the show cause order. AF, Tab 8. The appellant claims he made 8 protected disclosures: (1) A June 17, 2003, telephone call and e-mail to Ray Madden at the agency's Office of Inspector General; (2) an October 14, 2003, letter from the appellant's attorneys to Secretary of Energy Spencer Abraham; (3) a November 18, 2003, letter from the appellant's counsel to the offices of Congressman Edward Markey; (4) a February 24, 2004, letter to Secretary Abraham; (5) a June 8, 2004, e-mail to his supervisor, Owen Lowe, with copies to the union officials Michael Boblitt and Don Freeburn; (6) a June 21, 2004, e-mail to his second line supervisor, Dennis Miolta, with copies to Lowe and Boblitt; (7) a July 14, 2004, e-mail to Miolta with copies to Lowe and Boblitt; and (8) an October 21, 2004, e-mail to Miolta and Lowe with a copy to Boblitt. *Id.* at 7-12.

The appellant also alleges in response to the Board's order to show cause that the following "adverse actions" taken against him constitute "personnel actions" as defined in the whistleblower statute: (1) his oversight duties at ORNL were removed; (2) his supervisory duties were removed; (3) he was given unreasonable deadlines; (4) his position description was changed to require duties "far lower" than his previous position description; and (5) he "suffered periods of significant underemployment and under utilization" from October 2004 to November 2005. *Id.* at 19-20. He further alleges he "has met the statute by demonstrating" he: (1) was reassigned; (2) compelled

to take psychiatric testing;[4] and (3) "suffered" a significant change in duties, responsibilities and working conditions. *Id.* at 20. The agency also responded to the show cause order requesting, among other things, that I dismiss the appellant's "claim" because "it was already raised with and adjudicated by the Equal Employment Opportunity Commission and is currently on appeal before the U.S. District Court."[5] AF, Tab 14. After considering the parties submissions, I dismissed the agency's motion to dismiss and scheduled a hearing regarding

---

[4] The June 16, 2003, "Reassignment Statement" and accompanying memorandum required the appellant to attend "mandatory counseling" through the Employee Assistance Program (EAP). The appellant's supervisor made it clear, though, that although attendance at a meeting with EAP was "directed," the appellant's participation was voluntary. AF, Tab 11 at 26-27. I thus find the appellant has failed to make a nonfrivolous allegation that he was ordered to participate in "psychiatric testing or examination." Even if this was a "personnel action" for the purposes of the WPA, it was the result of the agency's view of the appellant's conduct through June 16, 2003, and could not have been based on an alleged whistleblowing disclosure occurring June 17 or later. The appellant thus also failed to make a nonfrivolous allegation that any whistleblowing disclosure was a contributing factor to the June 16, 2003, order to attend a meeting at EAP.

[5] I am puzzled by the time and effort expended by the agency in filing and pursuing this motion to dismiss. The Board settled the issue raised by the agency approximately 15 years ago, and basic research by agency counsel should have revealed this. *See Horton v. Department of the Navy*, 47 M.S.P.R. 475 (1991). The agency also sought to have me admit the EEOC decision of administrative judge Teitelman into evidence or give it collateral estoppel effect. I found no basis to admit it as evidence, and it does not meet the requirements for applying collateral estoppel. *See Kroeger v. U.S. Postal Service*, 865 F.2d 235, 239 (Fed. Cir. 1988).

the appellant's IRA. I determined that the Board has jurisdiction over the appellant's IRA. AF, Tab 17 at 1-2.

At the prehearing conference held March 24, 2006, I informed the parties of their respective burdens of proof and again informed the parties of the issues that would be addressed in the appeal. AF, Tab 25. During the conference, the appellant asserted he is alleging he disclosed substantial and specific dangers to public health and safety and/or violations of law, rule or regulation. *Id.* at 2. I ruled as follows:

> I find that the appellant has shown he has exhausted his Office of Special Counsel remedies and made nonfrivolous allegations that the following are protected whistleblowing disclosures: (1) Letter to Secretary of Energy Abraham-October 14, 2003; (2) Letter to Congressman Edward Markey -November 18, 2003; (3) Letter to Secretary of Energy Abraham-February 24, 2004; (4) June 21,2004 e-mail and enclosures to Dennis Miolta; (5) July 14, 2004, e-mail and attachment to Dennis Miolta; and (6) October 21, 2004, e-mail to Dennis Miolta.
>
> I also find the appellant has made nonfrivolous allegations that the above alleged whistleblowing disclosures were a contributing factor in the following alleged personnel actions: (1)

> reassignment, new position description and new performance plan -January 25, 2004; (2) assignment of additional work requiring overtime hours in August and September 2004;[6] (3) assignment of few or no duties between October 1, 2004 and April 25, 2005; and (4) new performance plan for FY 2005 in December 2004.

Id. Neither party filed objections to the prehearing conference summary although advised they could do so. *Id.* at 6.

I held the appellant's requested hearing on Wednesday, April 5, 2006, at the Board's Washington Regional Office. I heard the testimony of 5 witnesses including the appellant. The parties also entered into a stipulation of fact in lieu of the testimony of Mike Woods, and at the hearing the appellant withdrew Alesha Duncan, his approved witness. *Id.* at 5.

The appellant established Board jurisdiction over his IRA.

IRA jurisdiction-legal standards

The Board has jurisdiction in an IRA appeal over a claim that a personnel action was taken, proposed, threatened, or not taken because of the individual's whistleblowing activities. In order to prove that the Board has jurisdiction over an appeal

---

[6] On the record at the hearing, the appellant withdrew this as an alleged "personnel action."

as an IRA appeal, an appellant must show that he has exhausted his administrative remedies before the Office of Special Counsel (OSC) and make nonfrivolous allegations that: (1) He engaged in whistleblowing activity by making a protected disclosure under 5 U.S.C. § 2302(b)(8), i.e., he disclosed information that he reasonably believed evidenced a violation of law, rule or regulation, gross mismanagement, a gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety; and (2) the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action as defined by 5 U.S.C. § 2302(a). *See Rusin* v. *Department of the Treasury*, 92 M.S.P.R. 298, ¶ 12 (2002), *citing*, *Yunus* v. *Department of Veterans Affairs*, 242 F.3d 1367, 1371-72 (Fed. Cir. 2001). An appellant must establish jurisdiction over an IRA before the Board may address the merits of an IRA appeal. *See Wells* v. *Department of Homeland Security*, MSPB Docket No. DA-1221-04-0735-W-2 (May 10, 2006), slip op. ¶ 4.

In an IRA appeal, a "personnel action" is defined as: (1) an appointment; (2) a promotion; (3) an adverse action under 5 U.S.C. chapter 75 or other disciplinary or corrective action; (4) a detail, transfer, or reassignment; (5) a reinstatement; (6) a restoration; (7) a reemployment; (8) a performance evaluation under 5 U.S.C. chapter 43; (9) a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other personnel action; (10) a decision to order psychiatric testing or examination; or (11) any other

significant change in duties, responsibilities, or working conditions. 5 U.S.C. § 2302(b)(2)(A); 5 C.F.R. § 1209.4.

Besides establishing that he has exhausted his OSC remedy, an appellant must make nonfrivolous allegations that he disclosed what he reasonably believed evidenced a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or substantial and specific danger to public health or safety. The appellant need not prove that the situation actually existed, only that a reasonable person in his position would believe that it did. *Id.* Second, he must have disclosed the situation to persons who may be in a position to act to remedy it, either directly by management authority, or indirectly as in a disclosure to the press. *Schaeffer v. Department of the Navy*, 86 M.S.P.R. 606, 612 (2000), *citing*, *Horton v. Department of the Navy*, 66 F.3d 279, 282 (Fed. Cir. 1995), *cert. denied*, 516 U.S. 1176, (1996). The proper test for determining whether an employee had a reasonable belief that his disclosures revealed misconduct prohibited under the WPA is this: Could a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee reasonably conclude that the actions of the government evidence wrongdoing as defined by the WPA? *Lachance v. White*, 174 F.3d 1378 (Fed. Cir. 1999), *cert. denied*, 528 U.S. 1153 (2000).

If an appellant makes nonfrivolous allegations that he made a protected disclosure, he then is required to make nonfrivolous allegations that the disclosure was a contributing factor in the agency's

action or inaction. An employee may demonstrate that a disclosure was a contributing factor in a personnel action through circumstantial evidence, such as evidence that the official taking the personnel action knew of the disclosure, and that the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action (the knowledge/timing test). 5 U.S.C. § 1221(e)(1).

The appellant alleges he disclosed a violation of law rule or regulation. In making a disclosure involving a violation of law, rule, or regulation, it is not necessary that the disclosure specify a particular kind of fraud, waste, or abuse that the WPA was intended to reach; the inquiry into whether a disclosure is protected ends upon a determination that the appellant disclosed a violation of law, rule, or regulation. *See Schneider v. Department of Homeland Security*, 98 M.S.P.R. 377, ¶ 13 (2005); *Ganski v. Department of the Interior*, 86 M.S.P.R. 32, ¶ 11 (2000). There is no de minimis exception for the violation of law, rule, or regulation aspect of the WPA's protected disclosure standard. *See Lewis*, 101 M.S.P.R. 6, ¶ 11; *Ganski*, 86 M.S.P.R.32, ¶¶ 8-11.

The June 17, 2003, "disclosure" to Ray Madden from the agency's Office of Inspector General was not a protected disclosure

The appellant argues in response to the Board's show cause order that he made a protected disclosure when "[o]n June 17, 2003, [he] telephoned ... Mr. Madden reporting his June 16, 2003, Notice of

Reassignment and followed it up with an e-mail in which [he] gave a general overview of his safety concerns and abuses by Owen Lowe." AF, Tab 8 at 9. In a December 2005 statement included as an exhibit in this response, the appellant reiterates that "[o]n June 17, 2003, [he] contacted Mr. Madden reporting [his] June 16, 2003, Notice of Reassignment and gave a general overview of the safety concerns and abuses by Owen Lowe." *Id.*, Subtab 14 at 2. The June 17 e-mail sent from the appellant to Madden states, in relevant part:

> **Subject:** Request for an Investigation of Allegations of Employee Misconduct or Wrongdoing
>
> **Issue:**
>
> Allegation that my professional conduct and interaction with DOE/contractor personnel were unacceptable and damaging such that my supervisor felt that it warranted to remove me from my program management duties, and ordered me into mandatory counseling through the Employee Assistance Program (possible disciplinary actions pending).
>
> **Details:**
>
> Please see attached

> [Owen Lowe's June 16, 2003, reassignment letter apparently was attached here]
>
> **What I am Asking I.G. To Do:**
>
> I.G. to confirm the validity or non-validity of allegations made against me by either DOE or contractor personnel at the Oak Ridge National Laboratory site or DOE Headquarters which provided the bases for my supervisor taking the action against me as stated in his June 16, 2003 letter (attached above).

Id., Subtab 18 (emphasis in original).

Neither the e-mail nor the attached letter from Lowe mentions safety concerns. The appellant also failed to identify in response to the show cause order or in other record documents the specific safety concerns he allegedly disclosed to the Office of Inspector General on June 17. The e-mail itself does not allege any wrongdoing at all; the appellant merely asks the Inspector General to "confirm the validity or non-validity" of the allegations relied upon by Lowe when he reassigned the appellant. I therefore find that the appellant failed to make a nonfrivolous allegation that his June 17 contact with Madden was a protected whistleblowing disclosure.[7]

---

[7] The question of whether the appellant has made a nonfrivolous allegation isdetermined on the written record. *Wells*, slip op. ¶ 5.

The appellant failed to nonfrivolously allege that a protected disclosure was a contributing factor in his June 16. 2003, detail and removal of ORNL oversight duties or the June 27. 2003, letter of reprimand. [8]

The appellant alleges that the agency took covered personnel actions against him by removing his ORNL duties, removing his supervisory duties and detailing him, all on June 16, 2003. He also alleges his June 27, 2003, letter of reprimand is a personnel action that was issued in reprisal for whistleblowing. I find that the appellant's June 16 detail to a new set of duties removing him from the ORNL Program Manager position was a personnel action covered by the WPA. I also find that the June 27, 2003, letter of reprimand was a covered personnel action. I further find, however, that the appellant has failed to make a nonfrivolous allegation that any whistleblowing disclosure was a contributing factor in these personnel actions.

As I noted above, in order to establish IRA jurisdiction an appellant is required to make nonfrivolous allegations that a protected disclosure was a contributing factor in the agency's action. *Rusin*, 92 M.S.P.R. 298, ¶ 12, *citing Yunus*, 242 F.3d at 1371-72. An employee may demonstrate that a disclosure was a contributing factor in a personnel action through circumstantial evidence including, but not limited to, evidence that the official taking the personnel action knew of the disclosure and that the personnel action occurred within a period of

---

[8] The record establishes that the appellant exhausted his OSC remedies regarding these personnel actions. AF, Tab 2.

time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action. 5 U.S.C. § 1221(e)(l); *Wells*, slip op. ¶ 8; *Easterbrook* v. *Department of Justice*, 85 M.S.P.R. 60, ¶ 7 (2000).

I have already found the appellant did not make a nonfrivolous allegation that his June 17, 2003, contact with the Office of Inspector General was a protected whistleblowing disclosure. Even if the appellant had made such a nonfrivolous allegation, he did not make a nonfrivolous allegation that the disclosure was a contributing factor in removing his ORNL duties. or detailing him, actions taken by the agency on June 16, 2003. Whistleblowing cannot have been a contributing factor in any personnel action that the agency took before the appellant made a protected disclosure. *Easterbrook*, 85 M.S.P.R. 60, ¶ 12. It is undisputed that the agency took these personnel actions on June 16, the day before the alleged disclosure to the Inspector General. Therefore, the alleged June 17 whistleblowing cannot have been a contributing factor in these personnel actions.

I also find, even if the appellant made a nonfrivolous allegation he made a protected disclosure on June 17, 2003, he has failed to make a nonfrivolous allegation that the disclosure was a contributing factor in his June 27, 2003, letter of reprimand. When addressing the timing prong of the knowledge/timing test, the relevant inquiry is the time between when the agency official taking the action had actual or constructive knowledge of the disclosure, not the date of the disclosure itself, and

the time that the action was taken. *Wells*, slip op. ¶ 8. I note that the June 27 reprimand was based on events occurring in May 2003, and Lowe's June 16, 2003, reassignment memorandum informed the appellant that he [Lowe] was "considering disciplinary action a result of the [appellant's] recent behavior at Oak Ridge." AF, Tab 2, Exhibit F to the OSC complaint. Lowe also chose the most lenient form of formal discipline. The appellant further failed to nonfrivolously allege that Lowe, or someone influencing Lowe,[9] were aware of the alleged June 17, 2003, whistleblowing disclosure when, Lowe reprimanded the appellant on June 27, 2003. AF, Tab 2, Attachment 1 and Appendices A & B to OSC Form 11. In response to the Board's show cause order, the appellant merely alleges: "In this case, it is reasonable to assume that both Magwood and Lowe knew of the disclosures. On August 13, 2004, Magwood, responded to [the appellant's] ... letters to the Secretary of Energy and mentioned various position taken by Lowe...As such, one can only assume that both Magwood and Lowe knew of the disclosures." AF, Tab 8 at 17. For these reasons, the appellant's allegations failed the knowledge/timing test for the June 16 and June 27, 2003, personnel actions.

Therefore, I find that the appellant failed to make a nonfrivolous allegation that a protected

---

[9] An appellant can meet the knowledge prong of the knowledge/timing test by nonfrivolously alleging that the official taking the personnel action had actual or constructive knowledge of the disclosure. Constructive knowledge may be established by demonstrating that an individual with actual knowledge of the disclosure influenced the official taking the personnel action. *Wells*, slip op. ¶ 8.

disclosure was a contributing factor in the agency's June 16, 2003 personnel actions or the June 27, 2003, letter of reprimand.

> The appellant exhausted his OSC remedy regarding the October 14. 2003. disclosure/letter to Secretary of Energy Abraham and his reassignment and new position description in January 2004.

In an IRA, the Board may consider only those charges of whistleblowing that the appellant asserted before OSC. *Wells*, slip op. ¶ 6; *Dempsey* v. *Department of the Navy*, 59 M.S.P.R. 375, 376 (1993). Also, the Board only has jurisdiction over those personnel actions that have been raised with OSC. *See Lewis* v. *Department of Commerce*, 101 M.S.P.R. 6, ¶ 7 (2005). In his OSC complaint, the specifically identified and attached his October 14, 2003, letter to Secretary of Energy Spencer Abraham and alleged that the agency issued him a new position description/reassignment and new performance plan in January 2004 in reprisal for the October 14 disclosure. AF, Tab 2. Undisputed file documents establish that on September 16, 2005, OSC notified the appellant it was terminating its inquiry into his allegations and advised him that he had the right to seek corrective action from the Board. *Id.* The appellant therefore has shown he exhausted his OSC remedy regarding these matters.

The appellant made a nonfrivolous allegation that his October 14, 2003, letter to Secretary Abraham was a protected whistleblowing disclosure.

At the jurisdictional stage in an IRA appeal, an appellant is not required to prove that his disclosure is protected under 5 U.S.C. § 2302(b)(8). *Rice v. Department of Agriculture*, 97 M.S.P.R. 501, ¶ 9 (2004). Rather, the standard for establishing jurisdiction is a nonfrivolous allegation of facts that, if proven, would show that the appellant made a protected disclosure, i.e., that the matter disclosed was one which a reasonable person in his position would believe evidenced one of the situations specified in 5 U.S.C. § 2302(b)(8). *Id.* Any doubt or ambiguity as to whether an appellant raised a nonfrivolous allegation of a reasonable belief should be resolved in favor of a finding that jurisdiction exists. *See Sinko v. Agriculture*, MSPB Docket No. DC-1221-05-0581-W-1 (May 15, 2006), slip op. ¶ 11; *Huffman v. Office of Personnel Management*, 92 M.S.P.R. 429, ¶ 13 (2002).

I find that the appellant alleged sufficient facts that, if proven, would show his October 14, 2003, letter disclosed what a reasonable person would believe evidenced a violation of regulation. In the October 2003 letter, the appellant alleged through his counsel, among other things, he had been the program manager for the High Flux Isotope Reactor (HFIR) at ORNL since 1998, and that the HFIR is one of only two research reactors then operated by the agency. AF, Tab 2, Exhibit C to OSC Complaint. The letter also alleged that he had been

thwarted in his efforts to apply the Nuclear Safety Rule found at 10 C.F .R. part 830, he had challenged the technical accuracy of a contractor's nuclear safety documentation, and that Lowe had directed him to delete significant safety findings from an executive summary of a "Documented Safety Analysis [DSA]," a contractor report that details the safety envelope of a nuclear facility. *[d.*, Attachment 1 to OSC complaint; *see* 10 C.F.R. § 830.3 (Definitions).[10] Resolving any doubts in the appellant's favor, I find he made a nonfrivolous allegation that he made a protected disclosure of a violation of 10 C.F.R. part 830.

> The appellant made a nonfrivolous allegation that a protected whistleblowing disclosure was a contributing factor in the agency's decision to reassign him and issue a new iob description in January 2004.

By statute a reassignment is a covered personnel action, and there is no dispute the agency reassigned the appellant effective January 25, 2004, to a new position. 5 U.S.C. § 2302(b)(2)(A)(iv); AF, Tab 2 (Reassignment SF-50). I also find a covered "personnel action" occurred when the agency changed the appellant's duties from the "detail" set of duties dated June 16,2003, limited to the DSA and safety analysis reports regarding ORNL to a new position description (position #00016229) effective

---

[10] A DSA is defined by regulation as a documented analysis of the extent to which a nuclear facility can be operated safely with respect to workers, the public, and the environment, including a description of the conditions, safe boundaries, and hazard controls that provide the basis for ensuring safety.

January 25, 2004, with agency-wide responsibility as the "subject matter expert for nuclear safety." AF, Tab 2, Exhibit F to the OSC Complaint ("set of duties" on detail); Amirmokri position description (position #00016229); Tab 8, Subtab 12.[11] The appellant has made a nonfrivolous allegation that this change in duties was a "significant change in duties, responsibilities, or working conditions."[12] 5 U.S.C. § 2302(b)(2)(A)(xi).

The appellant, perhaps unskillfully, alleges that Lowe was aware of the October 2003 disclosure to Secretary Abraham in response to the Board's show cause order. AF, Tab 8 at 17. Furthermore, Lowe testified that he was aware the appellant had

---

[11] The appellant submitted a report and presented testimony from David Knudsen, a personnel management consultant. Although I admitted the evidence, I found Knudsen's report and testimony unhelpful and I give them little weight. Knudsen, as the appellant did, incorrectly focused on the change in duties from the "old' position description applicable before the appellant's detail in June 2003 to the duties required by the "new" position description implemented in January 2004. AF, Tab 12; Hearing Testimony, Knudsen. The agency, though, significantly changed the appellant's duties on June 16, 2003, and I have already determined that the appellant failed to make a nonfrivolous allegation that the June 16 detail and change of duties were the result of protected whistleblowing. The correct analysis therefore relates to the change in duties from the "detail" set of duties to the duties required by January 2004 position description. In any event, I find the appellant has made a nonfrivolous allegation that a protected disclosure was a contributing factor in a personnel action.

[12] Because of my findings, I need not address whether the alleged changes to the appellant performance plan or workload changes qualify as a "personnel actions."

sent a letter to Secretary Abraham addressing safety concerns regarding compliance with 10 C.F .R. part 830. Hearing Testimony, Lowe. I find the appellant has nonfrivolously alleged that Lowe knew about his October 2003 whistleblowing when he reassigned the appellant in January 2004. Applying the knowledge/timing test, I thus find the appellant has made a nonfrivolous allegation of "contributing factor."[13] I also therefore find that the appellant has established Board jurisdiction over his IRA.

The record contains clear and convincing evidence that the agency would have taken the same actions against the appellant in the absence of any protected disclosures.[14]

To obtain corrective action under the WPA, an employee must establish by preponderant evidence that he disclosed information he reasonably believed evidenced, among other things, a violation of any law, rule, or regulation. *See* 5 U.S.C. § 2302(b)(8)(A)(i); 5 C.F.R. § 1209.7(a); *Conrad v.*

---

[13] Once the knowledge/timing test has been met, an administrative judge must find that the appellant has proven his whistleblowing was a contributing factor in the relevant personnel action. *See Rubendall v. Department of Health & Human Services*, MSPB Docket No. DC-1221-05-0099-W-1 (April 28, 2006), slip op. ¶ 12.

[14] Once jurisdiction is established, an administrative judge has great discretion in determining which issues in an IRA to consider first. *See Wells*, slip op. ¶ 4; *Holloway v. Department of the Interior*, 95 M.S.P.R. 650, ¶ 13 (2004) (administrative judge correctly proceeded directly to "clear and convincing" issue). I have decided to address the "clear and convincing evidence" question first because I find it dispositive of the appellant's request for corrective action.

Department of Justice, 95 M.S.P.R. 636, ¶ 4 (2005). He must also prove by preponderantevidence that the disclosure was a contributing factor in a personnel action taken against him.[15]

---

[15] Although I am denying corrective action based on the agency's clear and convincing evidence, it is doubtful I would find that the appellant presented preponderant evidence that he made a protected disclosure. Although at first glance the appellant's allegations of safety concerns appear to have some merit, closer examination reveals he has done nothing more than raise the theoretical specter of a radiation release without identifying any substantial and specific risk to public health or safety. He did not, for example, allege that the cooling system of a nuclear reactor is inadequate. *See Mogyorossy v. Department of the Air Force*, 96 M.S.P.R. 652, ¶ 15 (2004); *Sazinski v. Department of Housing & Urban Development*, 73 M.S.P .R. 682, 686 (1997). The appellant's safety complaints in his alleged disclosure letters and e-mails are generally directed at: (1) The sufficiency of safety documentation to comply with the agency's nuclear safety regulation (10 C.F.R. part 830); and (2) Lowe's actions in allegedly directing him either in specific assignments or in his performance standards to violate the nuclear safety regulation. After reviewing the entire record, it appears that the ongoing dispute between the appellant and Lowe and other agency officials is. the type of policy dispute that the WPA was not intended to address. There is no language in the appellant's performance standards that can reasonably be interpreted to direct him to violate the nuclear safety regulation. Also, Lowe and others credibly testified that the appellant's positions on safety issues failed to consider the "graded approach" found at 10 C.F.R. § 830.7, which allows "the level of analysis, documentation, and action used to comply with a requirement in [10 C.F.R. § part 830]" to be commensurate with "relative importance to safety," "[t]he magnitude of any hazard involved," etc. 10 C.F .R. § 830.3 (definitions); Hearing Testimony, Lowe, Boyd, Miotla. The record confirms the testimony of these officials, as there is no record evidence that the appellant ever considered a "graded approach" when performing his duties.

Assuming an appellant meets this burden, the agency then must establish by clear and convincing evidence that it would have taken the same personnel actions in the absence of the disclosure. *Horton v. Department of the Navy*, 66 F.3d 279, 284 (Fed. Cir. 1995), *cert. denied*, 516 U.S. 1176 (1996). Clear and convincing evidence is that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established. 5 C.F.R. § 1209.4(d).

In determining whether an agency has shown by clear and convincing evidence that it would have taken the same personnel action in the absence of whistleblowing, the Board will consider the following factors: The strength of the agency's evidence in support of its action; the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision; and any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated. *Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999).

The agency has provided strong evidence to support its reassignment, change of duties, work assignments, etc. The genesis of the continuing dispute between Lowe and the appellant regarding his duties and how to perform them clearly occurred prior to January 2004. As I have discussed in detail above, Lowe removed the appellant from ORNL management responsibility, detailed him to a new set of duties and officially reprimanded him in June 2003 for his actions in May 2003 and earlier. AF,

Tab 8, Subtab 7. Compelling evidence shows that the events the appellant complains about beginning in January 2004 involved the agency's continuing, good-faith efforts to find the appropriate position and duties to use the appellant's expertise and strengths and its attempts to reasonably discuss/negotiate personnel and safety issues with him. AF, Tab 2, Exhibits A-F of OSC Complaint; Hearing Testimony, Lowe.

In the face of the agency's strong evidence to support its actions, the appellant presented virtually no evidence that any agency official suffered any negative consequences because of his alleged whistleblowing disclosures. Other than the de minimis requirement to write a response on behalf of Secretary Abraham or to a Congressman, there is no evidence that any agency official was compelled to do anything significant because of the appellant's alleged whistleblowing. Therefore, the record does not show that Lowe or other involved agency officials had a strong motive to retaliate against the appellant.

For the above reasons, I find that the agency established by clear and convincing evidence that it would have taken the same actions against/regarding the appellant in the absence of any alleged whistleblowing disclosures. [16]

---

[16] The record does not contain evidence regarding any similarly situated employees.

DECISION

The appellant's request for corrective action is DENIED.

FOR THE BOARD: /s/
Thomas P. Cook
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on JUN 29 2006, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. You must establish the date on which you received it. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition,

with supporting evidence and argument, must be filed with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.,
Washington, DC 20419

A petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition for review submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (https://e-appeal.mspb.gov).

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. If you claim that you received this decision more than 5 days after its issuance, you have the burden to prove to the Board the date of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury *(see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by electronic filing is the date of submission. The date of filing by personal delivery is the date on which

the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j).

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 60 calendar days after the date this initial decision becomes final.

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, http://fedcir.gov/contents.html. Of particular relevance is the court's "Guide for Pro Se Petitioners

and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were) sent as indicated this day to each of the following:

Appellant

U.S. Mail — Homi N. Amirmokri
15404 Pin Cherry Lane
Gaithersburg, MD 20878

Appellant Representative

U.S. Mail — Morris E. Fischer, Esq.
4550 Montgomery Avenue, Ste. 601N
Bethesda, MD 20814

Agency Representative

U.S. Mail — Isiah Smith, Jr., Esq.
Department of Energy, OGC
1000 Independence Avenue, S.W.
RMKA-211
Washington, DC 20002

Electronic Mail

Jocelyn Richards
Katie Strangis
Department Of Energy
1000 Independence Ave., SW
Room 6A-211
Washington, DC 20585

May 25, 2006
(Date)

/s/
Tori N. Stewart
Legal Assistant

NOTE: This order is nonprecedential

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

[Entered: April 30, 2008]

ORDER

A petition for rehearing en banc having been filed by the Petitioner, and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED. The mandate of the court will issue on May 7,2008.

FOR THE COURT,

/s/
Jan Horbaly
Clerk

Dated: 04/30/2008

cc: Morris E. Fischer
Tara Kilfoyle

AMIRMOKRI v. ENERGY, 2007-3101
(MSPB-DC1221060130-W-1)

***

there probably could have been some danger to the facility?

A Yes. That's why -- the rule says that you have to go through this analysis in order to ensure the safety of the people.

Q Now, after you discovered this, did you bring this up to -- who was your supervisor at the time?

A Mr. Lowe.

Q Okay. And after you discovered this, did you bring this whole thing what you learned up to Mr. Lowe?

A Yes. I prepared what I called a program manager's note. I think it was three, four pages. I went through all the regulations. I contacted people who have done this kind of thing before to get all the information I needed.

And I presented to my supervisor a packet and said that this is my plan to review this so that we can approve it for use. And part of that was that I had to get what we call subject matter experts, and I had estimated that it would have taken $50,000.

He graciously agreed to pay, like,

***

***

MR. FISCHER: I want you to take a look at -- this is, I believe, Exhibit No. 16.

JUDGE COOK: Appellant's?

MR. FISCHER: Appellant's.

JUDGE COOK: Yeah. Make sure you identify, since they're both numbered –

MR. FISCHER: Right. Appellant 16.

BY MR. FISCHER:

Q And correct me if I'm wrong, but this is October 14, 2003?

A That's right.

Q A letter?

A Yes.

Q Okay. And this is a letter from a Mr. Wachtel?

A Yes.

Q He was your attorney?

A Yes.

Q Okay. Did you authorize Mr. Wachtel to write this letter?

A Yes, I did.

Q Okay. And why did you do that?

A I had a lot of safety concerns, and I had communicated that to my supervisor, but they were going nowhere.

JUDGE COOK: When you say "supervisor," are you specifically talking about Mr. Lowe or someone else?

THE WITNESS: Mr. Lowe.

JUDGE COOK: Okay. Use the name when you can, because there are several people involved. Go ahead.

THE WITNESS: These were specifically violations of the Regulation 10 C.F.R. 830, and there were specific danger, because I felt if we don't do certain things there would be a very bad accident at the reactor, and people would get seriously hurt.

BY MR. FISCHER:

Q Okay. Now, when you raised these concerns to Mr. Lowe, what was his reaction? Let me rephrase the question. Why did you feel it was necessary to send this letter to the secretary of the Department of Energy?

A We were reviewing this massive document of the safety documentation, and as the team were reviewing different part of it they would come out with what they call safety significant problems.

Mr. Lowe, on a periodic basis, would

***

***

lists in the report that he reviewed which I attached to the exhibit, was the new position description.

JUDGE COOK: Okay. Go ahead. Appellant's 20 is Mr. Knudsen's report and attached document.

BY MR. FISCHER:

Q Can you take a look at that? Can you take a look at this?

A (Examining).

Q Do you recognize that document?

A Yes.

Q Okay. And what is that document?

A It's my position description.

JUDGE COOK: The old one or the new one?

THE WITNESS: It looks like the new one.

BY MR. FISCHER:

Q Okay. Now, what changed? Well, let me ask you this: Obviously, the documents speak for themselves, and Mr. Knudsen will

testify to all the changes, but just simply for the record, if you can identify this was, in fact, what you had received from Mr. Lowe?

A Yes.

Q In January of '04?

A Yes.

Q Okay. How have your duties changed after you have received this document?

A My duties completely changed. I was no longer responsible for managing the project or any project or any facility. It was not clear what the management expectation was for me to do when I come to work.

When I received this, I had one ongoing task, which was finishing up that review, but other than that this position description does not tell me that what you're supposed to do when you report aboard.

And I ask clarification numerous times, and it was never given to me. It doesn't tell me that you are doing anything.

Q Okay. Now let's talk about specifically what you did, take you back to various blocks in time, you know, what exactly your duties and responsibilities were during those different times.

You mentioned there came a point when you had finished that big document you were

***

***

Q Okay. And how long did that take you?

A I would say the whole thing may have taken me eight hours, but I may not have done it in one day. I may have just done it one hour a day, or something.

Q Okay. And then did you receive an assignment after that?

A Yes. Sometimes towards end of January, I believe, '04, I received –

Q Let's just back up. We're in '05 right now.

JUDGE COOK: You just described October of '04 through January of '05.

MR. FISCHER: So we're in January '05.

THE WITNESS: I received another task to review a booklet which had something to do with emergency management preparedness booklet.

MR. FISCHER: Okay. I want to show you what has been mark as Exhibit No. 23, if you could take a look at that.

BY MR. FISCHER:

Q Do you see on the bottom there is an e-mail from you to Mr. Lowe?

A Yeah.

Q And you say, "Please find advance copy

***

***

You were asking him questions about the position description, the performance plan, and I assume you're trying to address whether or not -- the legal questions about whistle blowing in relation to them. Let's focus on that.

MS. RICHARDS: Okay. Thank you, your Honor.

BY MS. RICHARDS:

Q What was the eventually outcome of the meetings that you had with your union representatives and with Mr. Lowe concerning the position description?

A No issue was resolved.

Q No issue was resolved. Okay. Did the union in any way grieve this process? Did they –

A Not to my knowledge.

Q -- protest to the fact that these issues were not resolved?

A Not to my knowledge.

Q Are you aware, Mr. Amirmokri, that this position description was reviewed by a Human Resources Specialist?

A May have been. I have no knowledge.

Q You have no knowledge of that? Okay. Are you aware, Mr. Amirmokri that this position was found to be a GS-15 level position?

A I did. I have heard from Mr. Nole, but I have no personal knowledge of that. It's hearsay from Mr. Nole.

Q Hearsay. Okay. In your experiences with the Department of Energy's Human Resources Department, would you have any reason to believe that they would engage in retaliation against you?

A The possibility is there.

Q The possibility is there? Okay. You believe that the Human Resources Department could be involved?

A I said possibility.

Q Okay. Would the Human Resources -- was the Human Resources Department copied on the letters that you sent to Secretary Abraham, Congressman Markie or the e-mail to Dennis Miotla?

JUDGE COOK: You know, you asked a question -- I can read those.

MS. RICHARDS: Okay. Thank you, your Honor. May I just have one minute, your Honor?

***

***

development?

A Appears to me we spent the last couple years in a tug of war. I mean, I don't think either of us have gotten very far. We've just been struggling to come to grips.

We're trying to find a place where he can be happy and productive. He seems to be struggling to retain and restore his own position which I don't, at this point in time at least, think is feasible. So it has been kind of a tug of war the last couple years.

MS. STRANGIS: I have nothing further at this time.

JUDGE COOK: Go ahead and proceed. Why don't we go ahead and finish him.

MR. FISCHER: Okay. Sounds good.

CROSS EXAMINATION

BY MR. FISCHER:

Q Mr. Miotla, you testified that Mr. Amirmokri is very inflexible, correct?

A Yes.

Q And he's deficient at application of regulations of law, correct?

A Yeah.

Q All right.

A He can read very well.

Q But when it comes to applying law, this guy would not be a good judge?

A No. I would not put him, again, at this point in time in a leadership position where judgment is required.

Q And you've been his second-line supervisor for how long?

A Three years, I think.

Q Starting from when?

A About 2003, this time around 2003.

Q Okay. And you're aware that he was removed from his duties back in -- withdrawn. You're aware that his position description changed in December of '04?

A Yes.

Q Right. And it's your understanding that that position description changed not based on a single incident but more of this is pretty much who the guy is?

A No. I thought it was mostly by the single incident, to be honest with you.

Q Okay. The single incident of inflexibility?

A No, the Oak Ridge incident. I think the desire was to get him out of a position where he was going to have to interact directly with the site.

He was in a position where he was a team leader and going out to the site, and I think that there was an incident out there that caused us grave concern and pause, and I think because of that we decided that we needed to have him in a position where he would be more at headquarters and less involved in interacting with and certainly not leading a team of people.

Q Right. You would note want this person leading a team of certainly experts, right, after this incident. Is that true?

A That's right.

Q Okay. And didn't you just testify, and correct me if I'm wrong, that you agree that it's important to create a position description or job duties, et cetera, for somebody to reflect their strengths and weaknesses, right?

A But it has to be a job that has value to us.

Q Obviously.

A Yeah. Sure.

Q Right. And in your opinion –

***

Homi Amimokri, under penalties of perjury herein attests to the following.

On or about May 5, 2003, I went on assignment to Oak Ridge, Tennessee. At this time, one of my duties included oversight of the transport of a Q-Ball cask, and a critical Transportation Safety Document ("TSD") that was to be prepared by the Department of Energy's contractor, UT-Battelle. This cask was approximately 10 feet high and some 20 feet in diameter. It served as a casing for the transport of nuclear material. Should the Q-Ball cask break during transport, the resulting radiation could be deadly and could cause serious and obvious consequences. On the aforementioned date, I was scheduled to receive a tour of the cask and the facilities which housed it.

After reassigning me at the end of June 2003, from about July of 2003-the end of September, 2004, my primary responsibility was to complete review of the HFIR safety documentation, which was approximately 40,000 pages. This involved leading a team of 20-25 subject matter experts. The deadlines became unreasonable because of many other assignments that Lowe gave me during this time between August-September of 2004. Due to my previous position and experience, I was not only the best person, but possibly the only person to complete this assignment. To complete this task Lowe gave me unreasonable deadlines to complete the review of the HFIR by the end of September, 2004. Following the HFIR review, from October 1, 2004-December 27, 2004, I was given no assignments at all; from 10/1/04-4/25/05, some 70% of his time was spent on

no assignment other than "increasing my level of expertise" and the other 30% of the time was spent on small discreet tasks such as reviewing the D.O.E.'s website. This was followed by two other periods of time in which I had no assignment or tasks at all, 6/3/05-8/05/05 and 8/11/05-11/14/05.

On June 17, 2003, I contacted Mr. Madden reporting my June 16, 2003, Notice of Reassignment and gave a general overview of the safety concerns and abuses by Owen Lowes who had ordered that I be evaluated for psychological testing, I was previously advised that this was the contact person from the Inspector General's office regarding these issues.

I do not set forth this affidavit as an entire summary of the events that occurred to me. Many of those have already been set forth in previous testimony and I don't see the need to restate much of what I have already testified to at hearing.

/s/_____
Homi Amirmokri, December 23, 2005

Strangis, Katie
From: Miotla, Dennis
Sent: Tuesday, February 01, 2005 1:29 PM
To: Lowe, Owen
Subject: RE: Owen, Homi: Update Activities

I agree.

> —Original Message—
> **From:** Lowe, Owen
> **Sent:** Tuesday, February 01,2005 1:09 PM
> **To:** Miotia, Dennis
> **Subject:** RE: Owen, Homi: Update Activities
>
> Dennis:
>
> It is prabably not a good idea to turn Homi loose on DSAs for older facilities that have required some thoughtful interpretation of 10CFR830. The ZPPR DSA, supposedly compliant with 10CFR830 requirements, was submitted for DOE review in April 2003. I don't know the status of the DOE review. I'll let you know when I do.
>
> Owen
>
> > —Original Message—
> > **From:** Miotla, Dennis
> > **Sent:** Tuesday, February 01, 2005 11:19 AM
> > **To:** Lowe, Owen
> > **Subject:** FW: Owen, Homi: Update Activities

I learned yesterday that the ZPPR DSA is really a 1992 SAR. A possible task for Homi could be to research and identify all of the nuclear facilities that NE is responsible for and then determining the status of their 830 compliant DSA.

—Original Message—
From: Amirmokri, Homi
Sent: Tuesday, February 01, 2005 11:02 AM
To: Lowe, Owen
Cc: Miotla, Dennis; Boblitt, Michael
Subject: RE: Owen, Homi: Update Activities

Owen,

Attached please find an advance copy of a paper[1] that i have prepared for our scheduled meeting tomorrow on the subject activities. FYI the paper summary is on the first two pages and the entire paper is 25 pages long[2].

Thanks,

Homi

---

[1]"Evaluation of the FY05 Events at DOE-NE Managed Facilities and the Identified Davis Besse RPV Corrosion Incident Performance Problems as Precursors."

[2]The attached paper is memory-intensive. It requires reader actions and will take approximately 45 seconds to open.

<<File: Evaluation of FY05 Events at NE Facilities and the Identified DBR Problems as Precursors.doc>>